



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA).

A848/2011
Case: A 501/2013
20/2/15

In the matter between:

Carl Louis Welgemoed

Appellant

and

The State

Respondent

JUDGMENT

Maumela J:

1. This appeal comes before us with the leave of the trial court sitting in Polokwane. In the court *a quo* the appellant was accused 1 one Eduard Pretorius was accused 2. Leave was granted to the appellant in respect of his convictions only.
2. Before the court *a quo*, the accused faced two charges, namely murder, read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 and robbery

with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act 1977.

3. Count 1 related to the killing of one C W van der Walt in Polokwane on 15 August 2003 and count 2 to the robbery of a red BMW motor vehicle, a video recorder, a cellular telephone and certain other personal effects of the said Van der Walt at the same time and place.
4. The accused both pleaded not guilty but were convicted on both counts. The appellant was sentenced to five years' imprisonment on each of the two counts.
5. Briefly stated the facts, which were mainly undisputed, were as follows:
 - 5.1 On the day of the incident the two accused were socializing at different places in Polokwane. After watching a video they went to a filling station to buy cigarettes, where they solicited a lift from the deceased. Along the way they stopped at the Castle Pub, where they befriended the deceased over a few drinks. The latter invited them for more drinks at his home.
 - 5.2 While drinking, the appellant excused himself to visit the bathroom. Upon his return he found accused 2

hitting the deceased repeatedly with a big (size 24) spanner on the head. His efforts to stop the assault were met with threats of violence against him from accused 2. He states that he kept quiet for his own safety. The deceased seemed to have lost consciousness. Accused 2 ordered him to assist in loading belongings of the deceased into the latter's car. He obliged out of fear for his own safety.

- 5.3 Before driving off he noticed that the deceased was still making faint movements. Accused 2 covered the deceased's head with a blanket and dealt him several more blows with the same heavy spanner.
- 5.4 The two then drove to Mr. Jardine's place where the appellant was renting a room. There the appellant remained seated in the car while accused 2 threw the loot over the wall into Jardine's premises. He later helped accused 2 to store the stolen goods in a back room at that house.
- 6 The difference between the appellant's involvement in count 1 and 2 is that in the case of the latter he willingly took part in the proceedings. He helped to carry away and later store the loot at Jardine's place. Despite his claim that he acted under duress, fearing for his life all the time, there is a clear

difference between the two cases: In the case of the murder he chanced upon the crime in the process of it being committed. In view of the nature of the relationship between the two of them and the threat by accused 2 it is reasonably possible that in the heat of the moment he could not find a way to interfere and stop the assault, or even of disassociating himself from it. The robbery was something different: when he helped to carry away and later store the loot, he was well aware that a serious assault had been perpetrated on the victim, who was in no state to offer any resistance. His willing participation in the robbery went considerably further on the next day when he assisted his co-accused to enjoy the fruits of their crime, as will appear below.

- 7 The next day accused 2 sent the appellant to town alone to sell some of the stolen goods and to purchase airtime, cigarettes and drinks. The appellant did everything he was told to do and did not use the opportunity to blow the whistle on accused 2.
- 8 The appellant and accused 2 told the appellant's landlady that they had beaten up a gay male sex pest and left him at the roadside. She later confronted the appellant with a report that she had seen in the local press about the murder of a

man in his home. The appellant broke down, wept and told her the full story. She reported the incident to the police, which eventually led to the trial of the two accused.

- 9 At their trial the two accused explained that they had met the deceased at the drinking place where he made unwelcome sexual advances to the appellant. Because of his intense dislike of homosexual people, accused 2 eventually attacked the deceased, even though the advances were not directed at him.
- 10 Appellant challenges his conviction on both counts. He denied any participation in the murder: upon his return from the bathroom he found accused 2 busy assaulting the deceased and his attempt to intervene was met with a threat against his own life. That same threat left him with no choice but to participate in the theft of the deceased's property. He denied having associated himself in any way with any of the actions of accused 2. Consequently, he argues that the court *a quo* erred in convicting him.
- 11 Murder is defined as the unlawful and intentional causing of the death of another human being¹. It is trite that in criminal cases, the burden is upon the state to prove every single element of the crime beyond reasonable doubt. In that

¹. See Criminal Law, Fifth edition, C.R. Snyman, at page 447.

regard the Supreme Court of Appeal in *Prinsloo v S*² enunciated the law as follows:

“It is trite that the State bears the onus to prove the guilt of the appellant beyond reasonable doubt and that there is no duty on the appellant to convince the court of the truthfulness of any explanation which he gives. If his explanation is found to be reasonably possibly true, the court will have no reason to reject it. See also *S v Mbuli*³, and *S v V*⁴. However, this does not require proof beyond any shadow of doubt by the state. See *S v Phallo*⁵. The same view is expressed by Slomowitz AJ in *S v Kubeka*⁶.”

- 12 The intention to kill the deceased is one of the elements that the state needed to prove against the appellant beyond a reasonable doubt. It is undisputed that the appellant did not actively participate in the attack on the deceased but only found accused 2 already attacking the deceased when he returned from the bathroom. Even at the second stage of the assault on the deceased when they were leaving the house, there is on the evidence no indication that the

². (534/13) [2014] ZASCA 96 (15 July 2014) paragraph [18], not reported.

³. 2003 (1) SACR 97 (SAC), at 110 D – E.

⁴. 2000 (1) SACR 453 (SCA), at page 455 B.

⁵. 1999 (2) SACR 558 (SCA), at paragraph 10.

⁶. 1982(1) SA 534 (W) at 537D.

appellant joined in the attack or that he encouraged or associated himself with it. The enquiry whether he did so is necessary in order to establish whether he had a common purpose with accused 2 in what the latter was doing.

13 In *S v Shaik*⁷ the court stated:

“Our law provides that where two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.”

Before a conviction of murder could be based on the doctrine of common purpose, it was incumbent upon the State to prove that the appellant had actively associated himself with that purpose and acted in furtherance thereof.

14 In the case of *S v Mgedezi*⁸, the court set the following five requirements for a person who did not causally contribute to the killing to be found liable:

14.1 He must have been present at the scene where the crime was being committed.

14.2 He must have been aware of the assault on the victim.

⁷. 1983 (4) SA 57, at page 65 A.

⁸. 1989 (1) SA 687 A, at page 705 i to 706 c

14.3 He must have intended to make common cause with those committing the assault

14.4 He must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others, and

14.5 He must have intended to kill the victim or to contribute to his death.

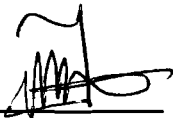
15 The question for decision is whether on the evidence set out above it can be found that the State proved beyond reasonable doubt that the appellant in any way participated in the attack on the deceased and whether he had the requisite intention to kill him. From the proven facts no participation nor the intention to kill can be inferred. That being the case it is clear that the appellant should not have been convicted of murder. I may mention that the allegation by the appellant that he did not interfere with the attack on the deceased because of his fear of accused 2, may seem suspicious. However, there is nothing on record to contradict his evidence. It also appears from the pre-sentence report (even though it only became available during sentencing proceedings) that the appellant is an extremely meek character who is easily dominated by others.

- 16 After storing the loot at Mr. Jardine's place as set out in paragraph 5.4 above, the appellant and accused 2 took a joy ride in the deceased's car, eventually overturning and abandoning it.
- 17 The conviction on count 2 remains to be considered. The appellant blames his participation in the robbery on accused 2, but two aspects about his subsequent conduct warrant further consideration. Firstly accused 2 sent the appellant to town the next day to sell some of the stolen goods in order to buy airtime, liquor and cigarettes. He went alone to sell the deceased's cell phone and brought back R100-00 to accused number 2. If he did not associate himself with what accused 2 had done, he could and should have reported the incident to the police. If he had been intimidated by the latter's threats to the extent that he said that he was, he could have asked the police for protection.
- 18 Secondly, he could have gone to the police after the departure of accused 2 to Rustenburg. Despite the warning that accused 2 allegedly gestured to him upon his departure, he could likewise have reported to and sought the protection of the police if he really feared for his safety.
- 19 In short, his conduct in assisting accused 2 to remove and later dispose of the loot clearly demonstrated his common

19 In short, his conduct in assisting accused 2 to remove and later dispose of the loot clearly demonstrated his common purpose with accused 2 in committing the robbery. His conduct on the scene in not taking part in the assault and in fact attempting to dissuade accused 2 from continuing with his assault on the deceased sufficiently shows that he actively disassociated himself from the criminal conduct of accused 2. It was not argued by the State before us that his conduct in keeping quiet and in fact lying to his landlady about the murder was sufficient to make him an accessory after the fact to the charge of murder and nor did the court *a quo* make such a finding. The fact that this court may not actually believe the version of the appellant is not sufficient reason for rejecting his version. The fact that it may reasonably possibly be true means that he is entitled to an acquittal on count 1.

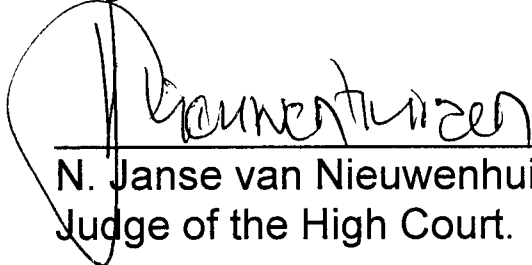
20 I propose the following order:

- 1. The appeal in respect of count 1 is upheld. The conviction on the charge of Murder is set aside.**
- 2. The appeal in respect of count 2 on a charge of Robbery with Aggravating Circumstances is dismissed.**



T. A. Maumela.
Judge of the High Court.

I agree.



N. Janse van Nieuwenhuizen
Judge of the High Court.

I agree and it is so ordered.



F. G. Preller
Judge of the High Court.